(2)

No. 06-1331

In The

Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

Duane J. Desiderio
(Counsel of Record)
Thomas J. Ward
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulation under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and has witnessed numerous situations where federal regulators have exercised authority beyond the CWA's limits.

NAHB is a petitioner in a CWA case pending before the Court, *NAHB v. Defenders of Wildlife,* No. 06-340 (consolidated with *EPA v. Defenders of Wildlife,* No. 06-549). It has also appeared as *amicus curiae* or "of counsel" in a number of cases involving landowners who have been aggrieved by over-zealous regulation under the CWA and other statutes and programs.[2]

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer &*

SUMMARY OF ARGUMENT

- ***Which Test from Rapanos Controls:*** The 4-1-4 decision in *Rapanos v. United States,* 126 S.Ct 2208 (2006), failed to provide a unifying theory to determine the scope of "navigable waters" under the CWA. A pronounced split among the circuit courts of appeals has thus developed on the "correct" test for ascertaining the CWA's scope. Millions of acres of property will remain in regulatory limbo until a majority of this Court announces the guiding test for "navigable waters" jurisdiction.

Frates v. Yolo County, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003); *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Protection*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

- ***Points of Consensus:*** In *Rapanos,* the plurality opinion authored by Justice Scalia and Justice Kennedy's separate concurrence in the judgment share important points of commonality. The Court should grant the petition to articulate these areas of consensus, and thereby provide tremendous guidance to the lower courts, the agencies implementing the CWA, and the regulated community as they interpret the key provision defining "navigable waters."

ARGUMENT

I. THE LOWER COURTS NEED GUIDANCE ON WHICH TEST FROM *RAPANOS* CONTROLS QUESTIONS OF CWA JURISDICTION.

Petitioners set forth (Pet. 9-15) the lower court conflict on whether and how the principles from *Marks v. United States,* 430 U.S. 188 (1977), apply to the Justices' varying *Rapanos* opinions. The oft-cited "rule" from *Marks* is:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who *concurred in the judgments on the narrowest grounds.*'

Marks, 430 U.S. at 193 (emphasis added) (citations omitted). The *Marks* formulation has not been a favorite of this Court. "This test is more easily stated than applied," and it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

In all of *Rapanos*, there is but a single, off-handed, and oblique reference to *Marks*. It is hidden in Chief Justice Roberts's concurrence:

> It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (discussing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

Rapanos, 126 S.Ct. at 2236 (Roberts, C.J., concurring). The Chief Justice declined to rely on *Marks* as direct authority, but simply noted the case as "discuss[ed]" in *Grutter*.[3]

No opinion in *Rapanos* provides even the barest analysis of *Marks*, or how it may be used to make sense of the Justices' varying tests for CWA jurisdiction. Nonetheless, several circuit and district courts (including the court of appeals below) have relied upon the "narrowest grounds" language to divine some holding amidst the 4-1-4 chaos on "navigable waters." See *United States v. Gerke*

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[3] In *Grutter*, the Court questioned whether Justice Powell's lone concurrence in the 4-1-4 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), decision was controlling under *Marks*. It found that it was not necessary to answer that question as a majority of the Court ultimately endorsed Justice Powell's view. *Grutter*, 539 U.S. at 325. *Grutter* does not extol *Marks* as a model of clarity, but rather cites *Nichols*, *supra* p. 3, to recognize that *Marks* "has so obviously baffled and divided the lower courts ...." *Id.* at 325 (citing *Nichols*, 511 U.S. at 745-46).

Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006); *No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006); *United States v. Johnson*, 467 F.3d 56, 60-65 (1st Cir. 2006); *United States v. Fabian*, 2007 WL 1035078 at *10 (N.D. Ind. March 29, 2007); *Simsbury-Avon Preservation Soc'y v. Metacon Gun Club*, 472 F.Supp. 2d 219, 225-27 (D. Conn. 2007), [appeal filed] No. 04-00803 (2d Cir. March 2, 2007); *United States v. Evans*, 2006 WL 2221629 at *19 (M.D. Fla. Aug. 2, 2006). Absent instruction from this Court, it is no wonder that the lower courts have rapidly devolved into conflict on how *Marks* should be applied—or indeed, whether the *Marks* test is at all appropriate—to determine the scope of "navigable waters" post-*Rapanos*.

A. Seventh and Ninth Circuits: Justice Kennedy's "Significant Nexus" Test is the Sole Controlling Standard.

The court of appeals below and the Ninth Circuit have interpreted the "narrowest grounds" to mean *only* the "significant nexus" test of Justice Kennedy's concurrence. See *Gerke Excavating*, 464 F.3d at 724-25 ("This test is narrower (so far as reigning in federal authority is concerned) than the plurality's in most cases ...."); *Healdsburg*, 457 F.3d at 1029 ("Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law"). Assuming for the sake of argument that "the narrowest grounds" from *Rapanos* means that opinion "least restrictive of federal authority," *Johnson*, 467 F.3d at

61,[4] it is not clear that Justice Kennedy's "significant nexus" test even fits that bill.

For example, on another occasion the Ninth Circuit decided that the CWA did not cover a pond because "Justice Kennedy's controlling concurrence explained that *only wetlands* with a significant nexus to a navigable-in-fact waterway are covered by the Act." *San Francisco Baykeeper v. Cargill Salt Division,* 481 F.3d 700, 707 (9th Cir. 2007) (emphasis supplied). The Ninth Circuit said: "[W]e emphasize that [the significant nexus] standard was for wetlands ...." *Id.* at 708. Thus, *Baykeeper* interprets significant nexus to *not* reach ponds, pools, creeks, or other non-wetland features.[5] In contrast, the *Rapanos* plurality

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[4] It is just as plausible to conclude that the "narrowest grounds" are those least restrictive on permissible, private land-uses. See *Johnson,* 467 F.3d at 63 ("one might sensibly conclude ... that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' *Johnson v. Bd. of Regents of the Univ. of Ga.,* 263 F.3d 1234, 1247 (11th Cir. 2001) ....").

[5] *Baykeeper* correctly placed bounds around "significant nexus" as only allowing coverage *vis-à-vis* wetlands, considering that the primary basis for Justice Kennedy's theory was *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). See, *e.g., Rapanos,* 126 S.Ct. at 2248 (Kennedy, J., concurring) (relying on *Riverside Bayview,* and stating: "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone"). Wetlands were the sole aquatic feature at issue in *Riverside Bayview,* where the Court afforded deference to the Corps's interpretation of "adjacent wetlands" in light of a thorough legislative and rulemaking record containing detailed findings on wetlands' unique ecological importance. *Riverside*

could consider such features as statutory "navigable waters" if they constitute "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features ....' " *Rapanos,* 126 S.Ct. at 2225 (Scalia, J.). Accordingly, the plurality might deem a feature like Walden Pond as within the CWA, while the "significant nexus" test would not stretch so far—because Walden Pond is *not* a wetland. From this perspective, the significant nexus test is *more* restrictive of Corps jurisdiction; more *types* of features escape CWA coverage under Justice Kennedy's approach compared to the breadth of Justice Scalia's analysis, which reaches non-wetlands. Hence, following *Baykeeper,* the plurality is arguably "the narrowest grounds" of concurrence.

The folly in deeming "significant nexus" a broader assertion of federal jurisdiction compared to the plurality's approach is further evidenced by Justices Scalia's and Kennedy's respective statements on the need for a hydrologic connection to trigger CWA coverage. For the plurality, a wetland is jurisdictional as long as it has "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands...." *Id.* at 2226 (Scalia, J.) However, Justice Kennedy would *not* endorse CWA jurisdiction over a wetland connected by a

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Bayview, 474 U.S. at 132-137. In contrast, ponds were not at issue in *Riverside Bayview.* And, the Corps has not made similar administrative findings in a rulemaking record on the functions that ponds, pools, ditches, or other non-wetland features may serve in the ecosystem. Indeed, this Court has previously determined that certain ponds fell outside the CWA's scope and "exceed[ed] the authority granted to [the Corps] ...." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001).

continuous but mere trickle to a traditional navigable water, because such a wetland would lack a "significant nexus." "[B]y saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.* at 2246 (Kennedy, J., concurring). Again, Justice Kennedy's approach poses greater incursions on Corps authority, so the plurality would provide "the narrowest grounds" of concurrence from *Rapanos—if* those grounds are determined by the least restrictions on federal jurisdiction.

B. First Circuit and Justice Stevens's Dissent: CWA Jurisdiction can be Proved Under *Either* Scalia Plurality *Or* Kennedy Concurrence.

Precisely because of the arbitrariness in discerning which test places greater limits on federal authority, in a 2-1 decision the First Circuit rejected the course of the court of appeals below and the Ninth Circuit in *Healdsburg.* It stated that "one might sensibly conclude ... that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' " *Johnson,* 467 F.3d at 63 (citations omitted). As the Petitioner points out (Pet. 12 n. 1), the *Johnson* court thus appeared ready to conclude that the plurality's permanent waterbody/continuous connection approach is a "logical subset" of the Kennedy standard, but it did not go that far. Rather, the First Circuit acknowledged "the shortcomings of the *Marks* formulation in applying *Rapanos*" that would arise if Justice Kennedy's concurrence—joined by no other Member of the Court—provided the controlling standard for determining the CWA's scope. *Id.* at 64. The *Johnson* court thus ruled that

"[t]he federal government can establish jurisdiction over the target sites if it can meet *either the plurality's or Justice Kennedy's standard* as laid out in *Rapanos*." *Id.* at 66 (emphasis added). Justice Stevens suggested this approach in his dissent. *Rapanos*, 126 S.Ct. at 2265 n.14 (Stevens, J., dissenting) ("[I]n these and future cases the United States may elect to prove jurisdiction under either test").

Additionally, a case is pending before the Second Circuit where the district court followed *Johnson*'s either/or approach and concluded that the CWA did not reach certain wetlands at an outdoor rifle range. *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club,* 472 F. Supp. 2d 219 at 226-27 ("...this Court will consider under both the plurality's and Justice Kennedy's standards the issue of whether the plaintiffs have demonstrated a genuine factual dispute about whether Metacon munitions are being discharged into the waters of the United States"); See also *United States v. Cundiff,* 480 F. Supp. 2d 940 (W.D. Ky. 2007) (adopting the First Circuit's either/or approach).

The circuit conflict is thus resolute. The Seventh and Ninth Circuits have ruled that *only* Justice Kennedy's approach governs "navigable waters" cases. Yet a majority of the First Circuit has ruled that "navigable waters" can be discerned under *either* Justice Scalia's plurality or Justice Kennedy's concurrence. The petition for certiorari should be granted so this Court can resolve the split.

C. Other Authorities: Justice Scalia's Plurality Provides the *Only* Test for CWA Coverage.

Review of other lower court opinions reveals a third point of view: Justice Scalia's plurality is the *sole* determinant for "navigable waters" jurisdiction.

In *Johnson,* Judge Torruella wrote separately to stress his belief that the *Rapanos* plurality provided the lone controlling analysis, because the "significant nexus" test raises serious constitutional concerns:

> I cannot concur that Justice Kennedy's seemingly opaque 'significant nexus' test is a constitutional measure of federal regulatory jurisdiction .... [The plurality's test] strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their *[sic]* property in accordance with their dreams and aspirations, whether economic or otherwise.

Johnson, 467 F.3d at 66-67 (Torruella, J., concurring in part, dissenting in part).

The first opinion to interpret *Rapanos* likewise complained that Justice Kennedy's concurrence "leaves no guidance on how to implements its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *United States v. Chevron Pipe,* 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). "Because Justice Kennedy failed to elaborate on the 'significant nexus' required," the *Chevron Pipe* court purported to avoid *Rapanos* altogether and "look[ed] to the prior reasoning in this circuit. The Fifth Circuit ... has interpreted 'the waters of the United States' narrowly .... Thus, as a matter of law in this circuit, the connection of

generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.* In effect, *Chevron Pipe* followed the *Rapanos* plurality—which limits CWA coverage only over "relatively permanent waterbodies"—as the sole jurisdictional test. See also *United States v. Marion L. Kincaid Trust,* 463 F.Supp.2d 680, 696 (E.D. Mich. 2006) (treating the *Rapanos* plurality as controlling without discussing "significant nexus").

To conclude, there are many questions about the CWA's coverage that have generated conflict and confusion in the lower courts, within executive branch agencies implementing the CWA, and among the regulated public. Does the *Marks* formulation apply in this context? If yes, what are the "narrowest grounds of concurrence" among the *Rapanos* Justices? Is it an either/or situation, where CWA jurisdiction can be alternatively supported under the reasoning of the Scalia plurality or the Kennedy concurrence? Or, does Justice Kennedy's approach trump the other *Rapanos* tests? Perhaps Justice Scalia's plurality opinion controls? All this, and *Rapanos* is less than a year old. Things will surely get worse unless this Court rapidly intervenes to lay some ground rules for interpreting *Rapanos.* Respectfully, the petition should be granted.

II. THE COURT SHOULD GRANT CERTIORARI TO EMPHASIZE THE AREAS OF CONSENSUS

AMONG THE *RAPANOS* PLURALITY AND CONCURRING OPINIONS.

Again, to detect a court holding among five Justices, the *Marks* formulation requires an examination of those differing opinions that "concurred in the judgments." *Marks*, 430 U.S. at 193. Any holding from *Rapanos* must therefore be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence—because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive interpretation of the CWA.[6] Justice Stevens's dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[7] With the approaches authored by Justices Scalia and Kennedy thus placed in proper focus, there are important points of consensus that this Court should announce. Illustrative topics of commonality between the plurality and Justice Kennedy's concurrence are as follows:

- **The CWA's scope is not restricted to traditional navigable waters.**

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[6] See *Rapanos*, 126 S.Ct. at 2235 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id.* at 2252 (Kennedy, J. concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ....")

[7] See *Rapanos*, 126 S.Ct. at 2265 (Stevens, J., dissenting) ("I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand").

- Plurality: "The Act's term 'navigable waters' includes something more than traditional navigable waters ...." *Rapanos,* 126 S. Ct. at 2220. The plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters." *Id.* at 2231.
- Kennedy Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." *Id.* at 2247.

- **The word "navigable," in the phrase "navigable waters," has meaning.**
  - Plurality: "[T]he traditional term 'navigable waters' ... carries *some* of its original substance ...." *Id.* at 2222.
  - Kennedy Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 2247. "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2248.

- **A mere hydrological connection can *not* provide the basis for CWA jurisdiction.**
  - Plurality: Rejecting the federal government's hydrologic connection theory in deciding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." *Id.* at 2220. "[R]elatively continuous flow

is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 2223 n.7.

- ➢ Kennedy Concurrence: Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters." *Id.* at 2247. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251.

- **Hypothetical, speculative, or eventual water flows do *not* support CWA jurisdiction.**
  - ➢ Plurality: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes." *Id.* at 2225 (emphasis supplied). *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 2226.
  - ➢ Kennedy Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 2248 (emphasis added). "When ... wetlands' effects on water quality *are speculative or insubstantial,* they

fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248 (emphasis added). In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims ...." *Id.* at 2251. In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge .... *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it." *Id.* at 2251-52 (emphasis added).

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**
  - Plurality: As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'...." *Id.* at 2225 (emphasis added). And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right ...." *Id.* at 2226 (original emphasis).
  - Kennedy Concurrence: "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark .... This standard* presumably provides a rough measure of the volume

and regularity of flow. ... *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 2248-2249 (emphasis added).

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**
  - ➢ Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We ... do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent ...." *Id.* at 2221 n.5. "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels." *Id.* at 2221 n.6.
  - ➢ Kennedy Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river ... Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete ... over a length of some 50 miles ...

Though this particular waterway *might satisfy the plurality's test,* it is illustrative of what often-dry watercourses can become when rain waters flow." *Id.* at 2242 (emphasis added).

- **As a general matter "navigable waters" and "point sources" are *not* the same thing, and normally a feature can't be both.**
  - Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id.* at 2223.
  - Kennedy Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could conceivably* constitute both a point source and a water." *Id.* at 2243 (emphasis added).

Amicus does not offer these points as an exhaustive list of all areas in which Justices Scalia and Kennedy agree. But these examples of consensus are important and, if articulated cohesively by a majority of Justices in a single opinion, would go a long way toward yielding proper and predictable CWA implementation in the field. Otherwise, lower courts are left to hazard guesses on what the Justices have decided and where they might overlap.

III. INSTRUCTION FROM THIS COURT ON *RAPANOS* IS SORELY NEEDED, BECAUSE CONFUSION ABOUT THAT CASE HAS HALTED BASIC FIELD DETERMINATIONS ON CWA JURISDICTION.

Interpreting the phrase "navigable waters" has never been easy. It was not easy in *Riverside Bayview* in 1985, it was not easy in *SWANCC* in 2001, and it was not easy in *Rapanos* in 2006. Indeed, prior to *Rapanos*, Congress held hearings to address the Corps's haphazard implementation of "navigable waters" jurisdiction.[8] The General Accounting Office has also reported rampant regulatory inconsistencies.[9] But in truth, the 4-1-4 *Rapanos* split has made matters worse in the field.

Soon after the Court decided *Rapanos*, on July 5, 2006, Corps headquarters issued a memo to its district offices

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[8] See, e.g., *Agency Implementation of the SWANCC Decision: Hearing Before the H. Subcomm. on Energy Policy, Natural Resources, and Regulatory Aff. of the H. Comm. on Gov't Reform*, 107th Cong. 2 (2002) (statement of Rep. Doug Ose, Chairman, H. Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs) (Corps determinations have "resulted in widely varying interpretations of the scope of jurisdiction," and the "current situation is creating confusion and chaos").

[9] U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf, at 3 ("Districts apply different approaches"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 22 ("three different district staff" would probably make "three different assessments").

(supplied in Appendix A attached to this brief). In the memo, headquarters admits its confusion about *Rapanos* and therefore instructs its district offices to "delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters . . . for the next three weeks." (App. 1a-2a.) Furthermore, the memo provides that Corps headquarters would send advice "as soon as possible and in the very near future." The Corps has to date provided no further advice, and the "three week" delay is now almost one year. (App. 1a-2a.)

The Corps's reaction to *Rapanos* has made a difficult regulatory program incomprehensible and unworkable. NAHB frequently hears from its members that field operations have come to a grinding halt and that Corps personnel are not making jurisdictional determinations because the law is unclear. It is commonly reported that Corps districts have not made *any* decisions on "navigable waters" jurisdiction for almost a year, since *Rapanos* was handed-down in June 2006. And no such field decisions are reportedly forthcoming until the Corps headquarters and the Environmental Protection Agency (EPA) provide "guidance" interpreting *Rapanos*.[10] But what can these

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[10] For example, the Corps Wilmington District has explained that while it waits for headquarters guidance it will not issue final jurisdictional determinations "in cases where there are intermittent or ephemeral streams or wetlands adjacent to intermittent, ephemeral or perennial streams." Regulatory Division-U.S. Army Corps of Engineers Wilmington District http://www.saw.usace.army.mil/WETLANDS/index.htm (last visited May 30, 2007). See also Steve Barnett & Michelle Tantalla, *Rapanos: The Feds and Intrastate Waters*, In Re: New Jersey Lawyer, Vol. 16, No. 9, Feb. 26, 2007, *available at* http://www.connellfoley.com/documents/jsb_mtt_njl_rapanos_

agencies realistically do, except read *Rapanos* like tea leaves and conjure some areas of agreement among the Justices? Respectfully, it is the province of *this* Court to explain what *Rapanos* means.

It is time for a course correction. The Court should seize this opportunity to clarify the muddy waters left in the wake of *Rapanos*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

June 4, 2007

Respectfully Submitted,

Duane J. Desiderio
(*Counsel of Record*)
Thomas J. Ward
National Association of Home Builders
Attorneys for Amicus Curiae

2-26-07.pdf (explaining that the Corp and EPA are holding off jurisdictional determinations until the agencies issue guidance); Kris Christen, *Supreme Court Splits on Wetlands Protection*, Water Environment and Technology, Vol. 18, No. 10, Oct. 2006, *available at* http://www.wef.org/ScienceTechnologyResources/Publications/WET/06Oct/06OctoberNews.htm (providing that the Corps has stopped issuing jurisdictional determinations nationally and that a large permit backlog will be created).

APPENDIX A

From: Sudol, Mark F HQ02

Sent: Wednesday, July 05, 2006 10:25 AM

To: CDL-REG-All; CDL-REG-CHIEFS; CDL-REG-MSC; CDL-REG-Ros

Cc: Barnes, Gerald W HQ02; Smith, Chip R HQDA; Wood, Lance D HQ02; Stockdale, Earl H HQ02; 'Schmauder, Craig R Mr OGC'; Dunlop, George S HQDA; Sherman, Rennie H HQ02; Cummings, Ellen M HQ02

Subject: Interim Guidance on the Rapanos and Carabell Supreme Court Decision

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the Rapanos/Carabell decision.

We anticipate that the Rapanos/Carabell decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably

change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the e tent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Headquarters Office of the Chief Counsel.

Until Corps Headquarters issues substantive guidance regarding the Rapanos/Carabell decision, Corps personnel should not represent any Corps position on the effect of these decisions on Clean Water Act jurisdiction in court pleadings or in any sort of dealings with outside parties. Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative

proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in United States v. Cundiff, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issues of CWA jurisdiction addressed by the Supreme Court's Rapanos/Carabell decision.

Similarly, during the period until we issue substantive guidance on how to implement the Rapanos/Carabell decision, you should not refer any new regulatory enforcement actions to the Department of Justice other than those involving illegal activities in or affecting traditionally navigable (Section 10) waters, or violation of the terms or conditions of Corps permits covering activities in Section 10 waters. If illegal discharges of dredged or fill material in other waters are causing significant, immediate environmental harm and would justify injunctive relief, notify CECC-L (Martin Cohen) and we will determine an appropriate response on a case by case basis.

Regarding the issuance of permit authorizations during the period before we issue substantive guidance on Rapanos/Carabell, all forms of Section 10 and CWA Section 404 permit authorizations for activities proposed to take place in the traditional navigable waters (i.e., the Section 10 waters) should continue to be issued as before, since the Rapanos/Carabell decision does not affect Section 10 of the Rivers and Harbors Act of 1899 at all, and does not affect CWA jurisdiction over any category of Section 10 waters. In waters other than the traditional navigable

(Section 10) waters, where a permit applicant proposes to conduct an activity involving the discharge of dredged or fill material pursuant to any form of CWA general permit authorization (e.g., NWP, regional general permit, SPGP, etc.), the Corps will continue to authorize those activities using applicable general permits, recognizing that such a permit applicant has the right to seek a modification of the terms and conditions or such a general permit authorization at a later time, as explained below.

Regarding applications for standard individual permits under CWA Section 404 covering activities involving the discharge of dredged or fill material outside the limits of the traditional navigable (Section 10) waters, as a general matter we expect that those individual Section 404 permits will continue to be issued as expeditiously as is practicable, to meet the legitimate needs of permit applicants, during the next few weeks while we are preparing substantive "Rapanos/Carabell guidance." The primary exception to that general rule might be for any individual Section 404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the Rapanos/Carabell decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The permit applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive

Rapanos/Carabell guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be reevaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in United States v. Cundiff, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issue presented by the Supreme Court decision.

If you cannot defer action that requires taking a position on the scope of "waters of the U.S.," then call Susmita Dubey in OGC at (202) 564-5577, Tom Charlton at (202) 564-6960 (for civil cases) or J. T. Morgan (for criminal cases) at (202) 564-7684 in OECA. For program implementation issues that may involve taking positions regarding scope of jurisdiction, but do not directly involve ongoing enforcement actions or lawsuits yet are hard to delay, contact Donna Downing regarding the 404 program at (202) 566-1367 and Debora Clovis regarding the 402 program (202) 564-0739.

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